IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR
Second Appeal No. 426 of 2006

Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	**Court's or Judge's Orders.**

CORAM : **A.P. Lavande,J**
DATE : 7th October, 2006

This second appeal has been preferred by the appellants/ original plaintiffs against the Judgment and decree dated 20th March, 2006 passed by the Ist Ad hoc Additional District Judge, Chandrapur in Regular Civil Appeal No. 58/1995 dismissing the appeal filed against the Judgment and decree dated 20th March, 1995 passed by the Civil Judge, Junior Division, Brahmapuri in Regular Civil Suit No. 104/1986.

2. The plaintiffs filed the above suit seeking permanent injunction against the defendants on the ground that they were trying to disturb the possession of the plaintiffs in respect of the land bearing gat no. 223/03 which has been inherited by them from their father Bhusaram Meshram who had encroached upon the Government land someway in the year 1957-58. According to the plaintiffs, the title of Bhusaram was perfected in the year 1980.

3. The suit was contested by the defendants/ respondents who disputed the title and possession of the plaintiffs to the suit property. It was further case of the defendants that the plaintiffs had tried to encroach upon the adjoining land gat no. 223/04 for which the defendants had filed the Civil Suit bearing number Regular Civil Suit No. 42/86.

4. The trial Court upon appreciation of the evidence led by the parties dismissed the suit holding that the plaintiffs had not proved their possession in respect of the suit property inasmuch as they failed to identify the suit property and also they had not given the boundaries of the suit property. In appeal preferred by the plaintiffs, the findings given by the trial Court have been confirmed.

5. Mr. Deshmukh, learned counsel appearing for the plaintiffs/appellants submitted that the reasons given by both the courts below for dismissing the suit are unsustainable in law inasmuch as although the boundaries of the suit property have not been given, the property has been sufficiently identified by gat number. He further submitted that in case both the courts held that the property was not properly identified, the Courts ought to have appointed the Commissioner to identify the property. Therefore, the learned counsel submitted that in case this court finds that the property has not been identified the

matter be remanded to the trial Court for appointment of Commissioner to identify the suit property. In support of his submission, the leaned counsel relied upon the Judgment of this Court in Kisanlal Maniklal Rathi vs. Dinkar Yashwant Patil, (2004(1) Mh. L. J. 138 and in Kashinath Chindhuji Shastri vs. Haribhau Nathuji Bawanthade (2004(2) Mh. L. J. 722.

6. I have perused the records and considered the submissions made by the learned counsel for the appellants/ plaintiffs. Both the courts below upon appreciation of the evidence oral and documentary have come to the conclusion that the plaintiffs have not been able to identify the property more particularly in the absence of the boundaries having been not given. Both the courts below have held that in order to get relief of permanent injunction it is absolutely essential to identify the suit property. This finding given by the trial Court which has been confirmed by the lower appellate Court, in my opinion, is based upon proper appreciation of oral and documentary evidence led by the parties. There are concurrent findings of fact recorded by both the courts below against the plaintiffs.

7. In so far as the Judgment in Kashinath Shastri's case (supra) relied upon by the appellant the dispute was regarding the encroachment in which the learned Single

Judge of this Court held that in case of encroachment the Commissioner must be appointed by the Court to take joint measurement of the land in encroachment.

In Kisan Rathi's case (supra) while dealing with the suit for possession on the strength of title in respect of encroachment made by the defendant the learned Single Judge held that it was necessary to appoint the City Surveyor to find out whether the encroachment has been made or not and for taking measurement of the property owned by the plaintiff and the defendant.

The ratio laid down in both the Judgments referred to above is not attracted in the present case inasmuch as it is not the case of the plaintiffs that the defendants have made any encroachment upon plaintiffs' property. The suit is for permanent injunction. Therefore, it was obligatory on the part of the plaintiffs to identify the suit property in order to get relief of permanent injunction. The plaintiffs having failed to do so, in my opinion, can not now contend that the Commissioner ought to have been appointed by both the courts below and, therefore, I hold that the two Judgments relied upon do not advance the case of the plaintiffs/appellants any further.

8. For the reasons above, I do not find any ground to interfere with the concurrent findings of facts recorded

by both the courts below. In any event no substantial question of law is involved in the present appeal. Therefore, the appeal is summarily rejected.

Judge

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